IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 158 OF 2003

M/s. Consolidated Chemequip (MFR) Corporation, having its registered office at 84/86A, Nagdevi Street, Bombay - 400 003. .. Applicant (Ori.Complainant)

Versus

1. State of Maharashtra.
2. Deviprasad Sukhdevprasad Chaturvedi, the Managing Director of Tria Fine Chem Limited, residing at 1502, Cliff Tower Co-op. Hsg. Society, Lokhandwala Complex, Andheri (West), Andheri (West), Mumbai - 400 056. .. Respondents

Mr. Anand Gandhi and N. Pandit for the applicant.

Mr. R.Y. Mirza, A.P.P. for respondent No.1.

Shri M.B. Mehere for respondent No.2.

CORAM: ANOOP V. MOHTA, J.

DATED : 23RD NOVEMBER, 2004.

ORAL JUDGMENT:

1. This is a Revision Application dated 10th April, 2003, filed by the applicant/original complainant against the order dated 10th December, 2002, passed by the Additional Sessions Judge, Greater Bombay, whereby, the Revision Application filed by the original

accused-respondent No.2, was allowed and the process issued against the accused-respondent No.2 was cancelled. The order passed by the Additional Chief Metropolitan Magistrate, Mazgaon (hereinafter referred to as "the Magistrate"), dated 25th February, 2002, was set aside and the process was recalled and respondent No.2/accused was discharged.

2. The applicants' complaint No.1093 S/1997 dated 15th March, 1996, against respondent No.2 for the offences under Section 138, 141 and 142 of the Negotiable Instruments Act (for short "the Act") was considered and the process was issued by the Magistrate. Respondent No.2, by an application dated 12th February, 2001, prayed for recalling the process and had also prayed for discharge. It was resisted by the applicant/original complainants. The Magistrate, after considering the merits of the matter, by an order dated 25th February, 2002, rejected the said application. Therefore, respondent No.2 had preferred the Revision Application against the said order before the Additional Sessions Judge, Mumbai. By the impugned order, the said Revision Application was allowed, process was recalled and respondent/accused was discharged. Therefore, this Revision by the applicants/complainant.

3. The learned counsel appearing for the applicant

has relied on **AIR 1998, S.C., 1057** [M/s. Modi Cements Ltd. Vs. Kuchil Kumar Nandi]; **1999, All. M.R. (Cri), 1845** [K. Bhaskaran Vs. Sankaran Vaidhyan Balan & Anr.]; **(1998) 6 S.C.C., 514** [Sadanandan Bhadran Vs. Madhavan Sunil Kumar]; and **2001, Cri.L.J., 4745** [K.N. Beena Vs. Muniyappan & Anr.] and contended that at this stage, the learned Sessions Judge ought not to have quashed the order of issuance of process, as unless proved otherwise, presumption exist of the liability. The rights are also created in favour of the complainant, based on the cheques issued, which are instruments under the Act. Therefore, he submitted to maintain the order passed by the Magistrate. The learned counsel for the applicant has filed on the record, a compilation of documents in support of his contention, to demonstrate that unless rebutted, prima facie, liability exists and, therefore, applicant/original complainants are entitled for the amount of the cheques.

4. The learned counsel for the respondent No.2, has supported the impugned order and relied on **2002, Cri.L.J., 3469** [Bharatbhai K. Patel Vs. C.L. Verma (since deceased) Thro' POA Surjit Singh Macker and anr.]; **2000 Cri.L.J., 257** [Narinder Kumar Vs. Harnam Singh]. The learned counsel for the respondent has also placed on the record, a compilation of documents to support their case of no liability as there was no compliances of the contract

terms.

5. Taking into consideration the documents, as well as, the Scheme of the Act, I am of the view that at this stage, prima facie, presumption is in favour of the applicant/complainant about the existence of the liability, as well as, the entitlement or realisation of the cheques by the complainant. The compilation of documents placed on the record also reflects the same. As contended, the complainant has performed his part of the contract based on the terms and conditions between the parties in respect of the delivery of the material. Therefore, at this stage, mere denial of the liability by the respondent/accused, cannot be sufficient, unless the presumption, as available under the Act, is rebutted by leading cogent and concrete evidence. The learned Sessions Judge, at this stage ought not to have interfered with the reasoned order passed by the learned Magistrate. The learned Magistrate in paragraphs 4, 5 and 6 has rightly considered the rival contentions raised between the parties and accordingly rejected the application for recalling of the process. The learned Sessions Judge ought not to have interpreted the terms and conditions of the agreement between the parties at this stage, while deciding the rival contentions raised by the parties based on the facts and terms and conditions. The respondent No.2 shall get full liberty and opportunity

to lead evidence in rebuttal to demonstrate that on merit they are not liable to make the payment, as there was no completion of the delivery of the goods, as contended. The commercial transaction and intention behind such transaction, cannot be decided merely on the basis of assertion and denial by the parties.

6. The Scheme of the Act itself provides the basic presumption, unless rebutted, in favour of the complainant specially when there is no dispute that - (a) A cheque was issued. (b) The same was dishonoured and/or bounced (c) Inspite of receipt of notice, within 15 days', the accused/respondent did not make the payment. (d) The complaint was filed within one month, as contemplated under Section 142(b). In the present case, admittedly, the respondent/accused had not even replied to the said notice under Section 138 of the Act.

7. There are documents on the record to support the case of the complainant, whereby respondent No.2 has admitted the liability also, but with various riders. The prima facie case, therefore, at this stage, is in favour of the complainant. The decision of the learned Sessions Judge, therefore, is not correct. The Apex Court's decisions, as cited and relied upon by the learned Magistrate, are also support the case of the

applicant/original complainant.

8. The Apex Court's decision in M/s. Modi Cements (supra), and specially paragraph 21, clinches the issue in favour of the applicant/complainant.

> "21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial."

9. The Apex Court, in Sankaran V. Balan (supra) has held that "there is a presumption that the cheque was drawn for consideration and the said presumption has to be rebutted by leading evidence". In K.M. Beena (supra), the Apex Court has further held that the burden lies upon the accused to prove that the cheque had not been issued for any debt or liability and the same has to be proved in trial by leading cogent evidence. It is, therefore, clear that the denial or averments in reply by the accused are not sufficient to shift the burden of proof on to the complainant.

10. The cases cited by the learned counsel appearing for the respondents are distinguishable on facts itself. In the present case, the documents filed by the parties

show, prima facie, case in favour of the complainant. Respondent No.2 was unable to satisfy at this stage that there was no existing debt or liability at the time of presentation of the cheque for encashment. Therefore, unless rebutted by leading evidence, it is difficult to accept the reasoning given by the learned Sessions Judge. The cases cited by respondent No.2, nowhere takes into consideration the principles laid down by the Apex Court, as referred above, in the cases cited by the applicant. In Narinder Kumar (supra), the judgment was passed after the trial of the particular case and not at the initial stage as contended in the present case.

11. For the reasons referred above, the Revision Application is allowed. The impugned judgment and order dated 10th December, 2002 in Criminal Revision Application No.319 of 2002 is set aside. The order of the learned Magistrate dated 25th February, 2002, is restored. The learned Magistrate to proceed and dispose of the Complaint No. 1093 S/1997 dated 15th March, 1996, preferably within a period of six months.

12. No order as to costs.

[ANOOP V. MOHTA, J.]